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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LYN DEANDRE WARREN, Defendant and Appellant.	B233523 (Los Angeles County Super. Ct. No. YA076721)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Brandlin, Judge. Affirmed in part; reversed in part.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Lyn Deandre Warren appeals from the judgment following a jury trial in which he was convicted of first degree murder in violation of Penal Code section 187, subdivision (a).[1] The jury also found true the allegations that appellant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)), and that he committed the murder for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). The trial court sentenced appellant to 50 years to life in state prison, calculated as 25 years to life for the murder, plus a consecutive term of 25 years to life for the firearm enhancement. The trial court imposed and stayed a 10-year term for the gang enhancement.

Appellant contends the trial court committed error in instructing the jury. Specifically, he argues the trial court (1) provided the jury with misleading homicide instructions denying him a fair trial on the issue of malice, (2) failed to provide the jury with adequate instructions on second degree murder despite the jury's request for such an instruction, and (3) improperly defined the elements of a criminal street gang. Appellant also contends the trial court erred in imposing and staying a 10-year sentence on the gang enhancement because he was sentenced to an indeterminate life term. We agree that the trial court improperly instructed the jury on the elements of a criminal street gang and made sentencing errors, but affirm the judgment in all other respects.

FACTS

On June 2, 2009 at around 3:25 p.m., Steven Rodriguez and Kevin Maximo, who were both 16 years old, rode their bicycles to the intersection of Lime Street and Inglewood Avenue in Inglewood, California to visit Maximo's girlfriend. Appellant, who is African-American and was almost 20 years old and a member of the Inglewood Pimping Gangster Bloods gang, approached Maximo, who was Hispanic and affiliated with the Inglewood 13 gang. The two traded loud, foul-mouthed racial and gang insults. Maximo, who was short in stature, got off his bicycle and challenged appellant to a fight.

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[1] All statutory references shall be to the Penal Code unless otherwise noted.

Appellant refused and walked away toward a group of people. Rodriguez and Maximo got back on their bicycles and started to ride away. Rodriguez then heard a gunshot. When he turned around, he saw blood on Maximo's shirt. Rodriguez saw appellant, who was wearing a bright red T-shirt, running in the opposite direction. Maximo died from a single gunshot that entered his back and perforated his spleen, stomach and heart.

Following the shooting, a resident who lived near the crime scene reported to police that at approximately 3:20 p.m. appellant, with whom he was familiar, walked past him wearing a red T-shirt and went toward an apartment complex in which appellant had previously lived. Police officers searched the complex and recovered a red T-shirt and a .22 caliber semiautomatic handgun hidden near the laundry room. Forensic testing revealed that the handgun had fired the cartridge recovered from the victim's body, and that appellant was the major contributor of the DNA found on the interior collar of the red T-shirt.

Inglewood Police Department Detective Kerry Tripp testified as a gang expert. According to Detective Tripp, appellant was a member of the Inglewood Pimping Gangster Bloods and used the moniker "Poppy." Detective Tripp testified that this is a small gang consisting of about 20 to 25 members and is affiliated with the larger Bloods gang in Inglewood. Detective Tripp also testified that members of the Inglewood Pimping Gangster Bloods primarily engage in carrying guns, possessing narcotics, and committing robberies and burglaries. The Inglewood Pimping Gangster Bloods and Inglewood 13 gangs are rivals. When presented with a hypothetical mirroring the facts of the instant case, Detective Tripp opined that such a shooting would have been committed to benefit the shooter's gang.

DISCUSSION[2]

I. CALCRIM No. 520

The jury was instructed with CALCRIM No. 520, "First or Second Degree Murder with Malice Aforethought (Pen. Code, § 187)."[3] Appellant argues that CALCRIM

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[2] The People contend that appellant has forfeited his right to raise the issue of instructional errors because he did not make any objections to the challenged instructions below. (See *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1233; *People v. Mace* (2011) 198 Cal.App.4th 875, 882; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1026.) Because appellant argues that his "substantial rights" were affected by the alleged instructional errors, we will address the merits of his claims. (Pen. Code, § 1259 [appellate court may "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Roder* (1983) 33 Cal.3d 491, 497; *People v. Valenzuela*, *supra*, at p. 1233; *People v. Blick* (2007) 153 Cal.App.4th 759, 775, fn. 8; *People v. Christopher* (2006) 137 Cal.App.4th 418, 426–427; *People v. Orellano* (2000) 79 Cal.App.4th 179, 181.)

[3] The jury was instructed on CALCRIM No. 520 as follows:

"The defendant is charged in Count 1 with murder in violation of Penal Code section 187. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought; [¶] AND [¶] 3. He killed without lawful (excuse or justification). [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural, and probable consequences of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] There may be more than one cause of death. An act causes death only if it is a substantial factor

No. 520 does not correctly state the law because it "makes no reference to the well-established principle that when—as here—heat of passion and imperfect self-defense are issues, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of provocation or imperfect self-defense in order to prove the malice element of murder."

A claim similar to appellant's was addressed and rejected in *People v. Genovese* (2008) 168 Cal.App.4th 817. There, as in this case, the trial court instructed the jury on malice with CALCRIM No. 520. (*People v. Genovese, supra*, at p. 827.) The defendant in *Genovese* complained that his jury was not told that "imperfect defense of another eliminates malice." (*Id*. at p. 830.) The appellate court rejected the claim, stating: "[I]t does not matter that the CALCRIM instructions failed to inform the jury that imperfect defense of another would eliminate malice. As we have set forth above, the jury was told, in a series of instructions, what different kinds of acts and situations would reduce the crime from murder to voluntary manslaughter. It is immaterial that the jury was not informed that, in fact, what was going on was that the jury was finding an 'absence of malice.' As Justice Corrigan has explained in her Preface to the CALCRIM jury instructions, 'our work reflects a belief that sound communication takes into account the audience to which it is addressed.' ([CALCRIM] Jury Instns. (2008) Preface, p. xi.) 'Malice is another word of multiple meanings in criminal law . . . .' (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 11, p. 213.) The definition of malice may be interesting to lawyers and judges and law professors, but it does not aid the task of lay jurors to inform them that, when the defendant acts in an honest but unreasonable belief in the need to defend another, he is acting without malice." (*Id*. at pp. 830–831.)

Similarly here, the jury was provided with a series of instructions that informed it under what circumstances the crime of murder would be reduced to voluntary

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in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death. [¶] If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree."

manslaughter. (See CALCRIM Nos. 500 ["Homicide: General Principles"], 522 ["Provocation: Effect on Degree of Murder"], 570 ["Voluntary Manslaughter: Heat of Passion—Lesser Included Offense"], and 571 ["Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense"]. Indeed, CALCRIM No. 570 expressly informed the jury that the prosecution had "the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion," and that if the prosecution did not meet its burden, the jury was required to "find the defendant not guilty of murder." Likewise, CALCRIM No. 571 expressly stated that the prosecution had "the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense," and that if the prosecution did not meet its burden, the jury was required to "find the defendant not guilty of murder."

Appellant argues that the presentation of the jury instructions led the jurors to first consider under CALCRIM No. 520 whether he was guilty of murder without later considering the voluntary manslaughter instructions in CALCRIM Nos. 570 and 571. But there is nothing in the record to suggest that the jury ignored any jury instructions. In the absence of such evidence, "We presume that jurors are intelligent and capable of understanding and applying the court's instructions." (*People v. Butler* (2009) 46 Cal.4th 847, 873; *People v. Lewis* (2001) 26 Cal.4th 334, 390.)

Accordingly, we find appellant's claim meritless.

II. Second Degree Murder

Appellant argues that the jury instructions failed to adequately define second degree murder. Specifically, he asserts that CALCRIM Nos. 520 and 521 were insufficient because they contained no definition of second degree murder, "and the trial court's slavish reliance on the CALCRIM pattern homicide instructions failed to give the jury the legal tools necessary to understand, evaluate, and decide whether [appellant]'s crime—if murder—was first degree or second degree murder." We disagree.

It is firmly established that CALCRIM No. 520 is an accurate statement of the law. (*People v. Johnigan* (2011) 196 Cal.App.4th 1084, 1092 ["The trial court gave the

approved CALCRIM instructions [Nos. 520 and 590] which were *accurate statements of the law and complete*," italics added]; see also Cal. Rules of Court, rule 2.1050(e) ["Use of the Judicial Council instructions is strongly encouraged"].) After completely and accurately setting forth the elements and requirements of murder, CALCRIM No. 520 instructed the jury that if it found appellant committed murder, it must next determine whether the murder was of the first or second degree. CALCRIM No. 521—the next instruction given to the jury—explained what constituted first degree murder, and informed the jury that it "must find the defendant not guilty of first degree murder" if those conditions were not met.[4] CALCRIM No. 522 then instructed the jury that "[p]rovocation may reduce a murder from first degree to second degree" and that "[i]f you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." Given these instructions, appellant's claim that the instructions "tease[d]" the jurors "without providing them with any idea how to make that decision" is without merit.

Appellant emphasizes the fact that the jury asked a question about second degree murder. During deliberations, the jury asked the trial court, "What is the definition of Murder 2?" Appellant's claim that the trial court "side-stepped" its obligation under section 1138 to ensure that the question was adequately answered and "simply rebuffed"

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[4] As provided to the jury, CALCRIM No. 521 stated: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The people have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

the jury's question is belied by the record.[5] """Where the original instructions are themselves full and complete the *court has discretion* under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information."""" (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 316–317.) We find no error by the trial court.

But even if we were to find instructional error, we would conclude that it was harmless. "We determine the prejudicial effect of instructional error under the [*People v. Watson* (1956) 46 Cal.2d 818, 836] standard by asking whether a reasonable probability exists the outcome would have been different but for the error." (*People v. Blick, supra*, 153 Cal.App.4th at p. 775, fn. omitted; *People v. Elsey* (2000) 81 Cal.App.4th 948, 953–954, fn. 2.)

"In reviewing a claim that the court's instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. [Citation.] We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. [Citation.]" (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.)

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5 The trial court held a conference to address the jury's question, during which the following discussion took place: "[DEFENSE COUNSEL]: I guess—I would think that the way to do it is tell them they have the definitions within the instructions. [¶] THE COURT: Yes, sir. [¶] [DEFENSE COUNSEL]: And they need to read them. Is there a particular instruction by number that they don't understand? The only thing I can think of. [¶] THE COURT: Mr. [Prosecutor], you need to keep your voice up, please. [¶] [THE PROSECUTOR]: I said I agree with that. [¶] THE COURT: Let me pen out a proposed response, please. [¶] [DEFENSE COUNSEL]: Okay. [Pause in the proceedings.] [¶] THE COURT: Okay. Here's my proposed response: 'The court has provided you with all of the relevant jury instructions dealing with the law of murder. The definitions of first-degree murder, second-degree murder, and voluntary manslaughter can be found in CALCRIM instructions number 500, 640, 520, 521, 2522, 570, and 571. If you have a question regarding a particular instruction or instructions, please be more specific.' [¶] [DEFENSE COUNSEL]: That's fine, Your Honor. [¶] THE COURT: That's acceptable with the defense? [¶] [DEFENSE COUNSEL]: Yes. [¶] THE COURT: The People? [¶] [THE PROSECUTOR]: Yes. [¶] THE COURT: All right. We will let you know when we hear back from the jurors. Thank you, counsel."

Here, the jury was instructed that the distinction between first degree and second degree murder rested on whether "the People have proved that [the defendant] acted willfully, deliberately, and with premeditation." (CALCRIM No. 521.) The jury was also instructed that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." (*Ibid.*) The jury was also instructed that it should consider provocation in determining whether the crime was second degree murder. (CALCRIM No. 522.) Thus, when the instructions are considered as a whole, the jury was apprised that provocation may reduce first degree murder to second degree murder if it found that appellant acted rashly or impulsively as a result of provocation and that he did not deliberate and premeditate. (*People v. Hernandez, supra,* 183 Cal.App.4th at p. 1334 ["Although CALCRIM No. 522 does not expressly state provocation is relevant to the issues of premeditation and deliberation, when the instructions are read as a whole there is no reasonable likelihood the jury did not understand this concept"].) In *People v. Rogers* (2006) 39 Cal.4th 826, the court concluded that the omission of a provocation instruction for second degree murder is not misleading, reasoning that "the jury is told that premeditation and deliberation is the factor distinguishing first and second degree murder," and that the manslaughter instruction "does not preclude the defense from arguing that provocation played a role in preventing the defendant from premeditating and deliberating; nor does it preclude the jury from giving weight to any evidence of provocation in determining whether premeditation existed." (*Id.* at p. 880.)

Moreover, there was insufficient evidence of provocation, such that any error in failing to give additional or clarifying instructions could be deemed anything but harmless. Appellant shot the victim in the back after their verbal exchange had ended and while the victim was riding his bicycle away from appellant and no longer a threat. Thus, there was no evidence from which a reasonable jury could have concluded that appellant acted immediately or in direct response to provocation when he murdered Maximo. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295–1296.)

III. CALCRIM No. 1401 and Gang Enhancement

With respect to the gang allegation, the jury was instructed with CALCRIM No. 1401.[6] Appellant contends the trial court erred in modifying CALCRIM No. 1401 to include among the primary activities committed by the group "robbery, assault and sales of narcotics." We agree.

In instructing the jury on the definition of "criminal street gang," the trial court modified CALCRIM No. 1401 to state that "A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] . . . [¶] 2. That has, as one or more of its primary activities, the commission of robbery, assault and sales of narcotics . . . ." The problem with this definition is that the prosecution's gang expert did not identify either assaults or the sales of narcotics as primary activities of the Inglewood Pimping Gangster Bloods.[7] The expert identified the primary activities of the Inglewood Pimping Gangster Bloods as follows: "They carry guns, rob people, commit burglaries. Crimes of that nature. Possess narcotics." On

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[6] As provided to the jury, CALCRIM No. 1401 stated in relevant part: "A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of robbery, assault and sales of narcotics; [¶] AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. [¶] In order to qualify as a primary activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group. [¶] . . . [¶] A pattern of criminal gang activity, as used here, means: [¶] 1. The commission of, or conviction of, [¶] 1A. (any combination of two or more of the following crimes, or two or more occurrences of one or more of the following crimes:) burglary; murder; [¶] OR [¶] 1.B. at least one of the following crimes: burglary; [¶] AND [¶] At least one of the following crimes: murder; [¶] 2. At least one of those crimes was committed after September 26, 1988; [¶] 3. The most recent crime occurred within three years of one of the earlier crimes; [¶] AND [¶] 4. The crimes were committed on separate occasions or were personally committed by two or more persons."

[7] Based on our review of the expert's testimony, it appears the trial court mistakenly listed the offenses identified by the expert as the primary activities of the victim's rival gang, Inglewood 13.

cross-examination, he testified he had personal knowledge that members committed crimes "such as carrying weapons, ex-felons with weapons, narcotics, robberies, burglaries." While the expert identified robbery as a primary activity, there was no evidence presented of any criminal acts committed by a member of the group which involved robbery. The two predicate convictions admitted into evidence involved burglary and possession of a firearm by a felon.

The definition of "criminal street gang" presented to the jury was clear error. It allowed the jury to find that the Inglewood Pimping Gangster Bloods was a criminal street gang because its members engaged in assaults and narcotics sales when there was no evidence that any member ever actually engage in such activities.

But the error is of little consequence here because the sentence on the gang enhancement was unauthorized and must be reversed, as the People concede.

Appellant was convicted of first degree murder and sentenced to 50 years to life, calculated as a term of 25 years to life plus a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d). The trial court also imposed and stayed a 10-year enhancement pursuant to section 186.22, subdivision (b)(1)(C), based on the jury's true finding on the gang allegation.

In *People v. Lopez* (2005) 34 Cal.4th 1002, our Supreme Court held that "first degree murder is a violent felony that is punishable by imprisonment in the state prison for life and therefore is not subject to a 10-year enhancement under section 186.22(b)(1)(C)." (*Id.* at p. 1004.)

Accordingly, the jury's true finding on the gang allegation is reversed and imposition of the ten-year enhancement must be stricken.

IV. Presentence Credit

Appellant was awarded 592 days of presentence custody credit, calculated as 515 days of actual presentence custody credit, plus 77 days of "good time/work time" conduct credit. The People contend, correctly, that appellant is only entitled to 544 days of presentence custody credit and no "good time/work time" conduct credit.

Appellant was arrested on December 4, 2009, and sentenced on May 31, 2011, a period of 544 days. Thus, appellant is entitled to 544 days of actual presentence custody credit. (§ 2900.5, subd. (a); *People v. Johnson* (2010) 183 Cal.App.4th 253, 289 [noting that section 2900.5 credit "applies to all defendants"].)

But appellant is not entitled to any conduct credit. Section 2933.2, subdivision (a), provides that "any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933 or Section 2933.05." Here, appellant was convicted of first degree murder. "The plain language of section 2933.2 prohibits a grant of presentence conduct credits to convicted murderers after the effective date of the statute [June 2, 1998]." (*People v. Herrera* (2001) 88 Cal.App.4th 1353, 1366.) As such, appellant was not eligible to receive the 77 days of presentence conduct credit awarded by the trial court. (*People v. McNamee* (2002) 96 Cal.App.4th 66, 70 ["[S]ection 2933.2, subdivision (c) states without qualification that 'no credit' pursuant to section 4019 may be earned by a person convicted of murder"].) Accordingly, such credit must be stricken. (*Ibid.*; see also *People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8 [custody credit errors are jurisdictional and may be raised at any time].)

DISPOSITION

We reverse the jury's finding on the gang allegation and order the trial court to strike the 10-year gang enhancement imposed pursuant to section 186.22, subdivision (b)(1)(C). We also order the trial court to correct the amount of presentence credit to reflect an award of 544 days of actual presentence custody credit. The trial court is ordered to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ